

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

74-1835

---

**United States Court of Appeals**

For the Second Circuit.

---

SHATTUCK DENN MINING CORPORATION,

*Plaintiff-Appellee-Appellant,*

- v. -

WILLARD J. LaMORTE,

*Defendant-Appellant-Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF OF PLAINTIFF-APPELLEE-APPELLANT  
SHATTUCK DENN MINING CORPORATION**

---

BURNS, VAN KIRK, GREENE & KAER

*Attorneys for Shattuck Denn Mining Corporation,  
Plaintiff-Appellee-Appellant*

521 Fifth Avenue

New York, N.Y. 10017

972-0500

ALAN PALWICK  
*Of Counsel*

## INDEX

	Page
ISSUES PRESENTED.....	1
THE STATUTE.....	2
STATEMENT OF THE CASE.....	3
STATEMENT OF FACTS.....	3
POINT I:	
THE COURT BELOW ERRED IN NOT ADOPTING A VALUATION FOR FIREPROOF SHARES EQUIVALENT TO \$7.57 PER SHATTUCK SHARE AND IN ADDING A PREMIUM FOR TRANSFER OF CONTROL.....	6
POINT II:	
THE COURT BELOW ERRED IN NOT GRANTING PRE-JUDGMENT INTEREST ON THE AWARD TO SHATTUCK.....	14
CONCLUSION.....	14

## TABLE OF AUTHORITIES

### CASES:

<u>B. T. Babbitt, Inc. v. Lachner</u> , 332 F. 2d 255 (2nd Cir. 1964).....	7,8
<u>Blau v. Lamb</u> , 163 F. Supp. 528, 531 (S.D.N.Y. 1958).....	7,9
<u>Blau v. Lamb</u> 242 F. Supp. 151 (S.D.N.Y. 1965), aff'd in part and rev'd in part, 363 F. 2d 507 (2nd Cir. 1966), cert. den. 385 U.S. 1002 (1967)...	7,9,13

	Page
<u>Blau v. Mission Corp.</u> , 212 F. 2d 77 (2nd Cir. 1954), cert. den. 347 U.S. 1016 (1954).....	7
<u>Champion Home Builders Co. v. Jeffress</u> , 352 F. Supp. 1081 (E.D. Mich. 1973).....	9
<u>Fistel v. Christman</u> , 135 F. Supp. 830 (S.D.N.Y. 1955).....	8
<u>Marquette Cement Mfg. Co. v. Andreas</u> , 239 F. Supp. 962 (S.D.N.Y. 1965).....	8
<u>Mueller v. Korholz</u> , 449 F. 2d 82, 88 (7th Cir. 1971).....	13
<u>Newmark v. RKO General, Inc.</u> , 305 F. Supp. 310 (S.D.N.Y. 1969), aff'd. 425 F. 2d 348 (2nd Cir. 1970), cert. den. 400 U.S. 854, reh. den. 400 U.S. 920 (1970).....	7,9
<u>Park &amp; Tilford, Inc. v. Schulte</u> , 160 F. 2d 984 (2nd Cir. 1947), cert. den. 332 U.S. 761 (1947).....	7,9
<u>Stella v. Graham - Paige Motors Corp.</u> , 132 F. Supp. 100 (S.D.N.Y. 1955), remanded on other grounds, 232 F. 2d 299 (2nd Cir. 1956), cert. den. 352 U.S. 831 (1956).....	8
STATUTE:	
Section 16(b) of the Securities Exchange Act of 1934.....	2

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-1835

---

SHATTUCK DENN MINING CORPORATION,

Plaintiff-Appellee-Appellant,

- v. -

WILLARD J. LaMORTE,

Defendant-Appellant-Appellee.

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

---

BRIEF OF PLAINTIFF-APPELLEE-APPELLANT  
SHATTUCK DENN MINING CORPORATION

---

ISSUES PRESENTED

1. Did the Court below overvalue shares of The Fireproof Products Co., Inc. ("Fireproof"), received by an insider (defendant "LaMorte") of Shattuck Denn Mining Corporation ("Shattuck") as a result of a merger of Fireproof into a subsidiary of Shattuck, for purposes of determining liability under Section 16(b) of the Securities Exchange Act of 1934?

2. Was Shattuck entitled to recover pre-judgment interest on such profits where the transactions were deliberately not contemporaneously reported on the form (Form 4) required by the SEC?

THE STATUTE

SECURITIES EXCHANGE ACT OF 1934, AS AMENDED

Section 16(b):

"For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which

the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

#### STATEMENT OF THE CASE

Shattuck sued LaMorte for short-swing profits under the provisions of Section 16(b). After a full trial, Judge Carter granted a judgment in favor of Shattuck in the amount of \$4,875. Judge Carter refused to permit pre-judgment interest.

#### STATEMENT OF FACTS

During the period June 30, 1963, through July 31, 1967, LaMorte was an officer/director of Shattuck, whose common shares were then trading on the American Stock Exchange (App. A105).

During the aforementioned period of time, LaMorte maintained a minority position in four partnerships. These partnerships made purchases and sales on the said Exchange of Shattuck's common shares as reflected in P ex. 1, 11 and 12 (App. A106).

On February 1, 1966, and as a result of a merger of Fireproof into a subsidiary of Shattuck, LaMorte, in his individual capacity received for his shares of Fireproof stock, unregistered shares of Shattuck's stock. The shares were exchanged based upon a fixed ratio of 13.21 shares of

Shattuck's stock for each share of Fireproof stock. Fireproof was a closed corporation whose shares were not traded on any national exchange or in the "over-the-counter" market. The exchange ratio was premised upon a market value of \$10.75 per share of Shattuck stock (as at December 3, 1964) and a book value of Fireproof stock as at December 31, 1964 (\$142.00 per share). Upon the effective date of the merger, the mean value of Shattuck's stock had fallen to \$8.75 per share (\$2.00 below its mean market value as used to establish the exchange ratio). The book value of Fireproof as of the effective date of the merger was \$1,708,964.01, or \$146.04 per share, an increase of \$4.19 per share over its per share book value as used to obtain the exchange ratio, which amounts to \$11.05 per share of Shattuck received (App. A106-7). The SEC began an investigation in late April, 1967, into trading of Shattuck's stock, at which time Shattuck first discovered that LaMorte had been actively trading in its stock (App. 25, 43).

At the request of Shattuck, LaMorte made available to Shattuck's accountants and attorney all brokerage statements and confirmations relating to trades of Shattuck's stock, including those of the partnerships. From this documentation, Shattuck's accountants matched purchases and sales as reflected in P ex. 13 and 14. The accountants

chose, as the purchase price of Shattuck's shares acquired on the exchange of the Fireproof shares, alternate sums of \$8.75 per share and \$10.75 per share (App. A107). As reflected in P ex. 10, these documents set out transactions from July 1, 1963, to July, 1967, which were not reflected in previous Form 4's filed by LaMorte with the SEC and Shattuck during that period.

Based upon Shattuck's calculations using a purchase price of \$10.75 per share cost of the exchanged shares, payment was made to Shattuck of alleged "short-swing profits" (App. A107).

The deliberate failure of LaMorte to file accurate Form 4's during the period from July, 1963, to July, 1967, is shown by P ex. 1 which is a Form 4 filed by LaMorte for the month of June, 1963, where he picked up transactions which had been theretofore unreported and paid to Shattuck his short-swing profits on such transactions (App. 18-19; 326-27).

At the trial Shattuck's expert valued the Fireproof shares as of February 1, 1966, at the equivalent of \$7.57 per equivalent Shattuck share (App. 142-43). LaMorte's expert valued the shares at \$15.14 per Shattuck share, which included a 25% premium for "control" (App. 285).

The Court below rejected the testimony of both experts as to valuation, adopting the theory that the market

price of Shattuck on February 1, 1966, plus a 25% premium for control would be the value of the shares, yielding a net value of Fireproof shares equivalent to \$10.00 per Shattuck share.

POINT I

THE COURT BELOW ERRED IN NOT ADOPTING  
A VALUATION FOR FIREPROOF SHARES EQUIVALENT  
TO \$7.57 PER SHATTUCK SHARE AND IN  
ADDING A PREMIUM FOR TRANSFER OF CONTROL

Paragraph "6" of LaMorte's answer admits that profits realized by LaMorte from sale of Shattuck's stock "is measured by the fair market value of defendant's Fireproof stock at the time of its exchange for plaintiff's stock on February 1, 1966." The relevance of this date is reinforced by the pre-trial order (App. A110), at which time one of the issues to be tried by the Court was formulated as follows:

What was the fair value of Fireproof shares on February 1, 1966?

This is our basic contention with respect to valuation of shares of Shattuck's stock received on the merger.

Upon the merger of Fireproof into Shattuck's subsidiary on February 1, 1966, LaMorte and the Partnerships received shares of Shattuck stock. This exchange is considered a "purchase" for purposes of §16(b) and the purchase

price for the Shattuck stock received on the exchange is the value of the Fireproof stock given in exchange therefor, Blau v. Lamb 242 F. Supp. 151 (S.D.N.Y. 1965), aff'd in part and rev'd in part, 363 F. 2d 507 (2nd Cir. 1966), cert. den. 385 U.S. 1002 (1967), Blau v. Mission Corp. 212 F. 2d 77 (2nd Cir. 1954), cert. den. 347 U.S. 1016 (1954), Park & Tilford, Inc. v. Schulte, 160 F.2d 984 (2nd Cir. 1947), cert. den. 332 U.S. 761 (1947), Blau v. Lamb, 163 F. Supp. 528, 531 (S.D.N.Y. 1958).

In valuing the shares of stock given in exchange for shares subject to §16(b), the courts look to various factors. For example, in Blau v. Lamb, 242 F. Supp. 151, supra, after hearing expert testimony, the court found that market value was in excess of book value with respect to a non-publicly traded company and added \$2.50 per share to book value to arrive at market value. On the other hand, in Newmark v. RKO General, Inc., 305 F. Supp. 310 (S.D.N.Y. 1969), aff'd. 425 F.2d 348 (2nd Cir. 1970), cert. den. 400 U.S. 854, reh. den. 400 U.S. 920 (1970), the securities given up were valued at the market value of the securities received.

In B. T. Babbitt, Inc. v. Lachner, 332 F. 2d 255

(2nd Cir. 1964) the court found as follows (at p. 258):

"In determining the 'purchase price' of the common obtained on the conversion, we must necessarily value the preferred which was surrendered in return. And ... the parties have expressly stipulated here that there was no market for the Series 'B' Preferred at the time of conversion. As a result, we find that the District Court was correct in determining that the preferred might only be valued by looking to the market price of the common received in return and into which it was readily convertible."

In Marquette Cement Mfg. Co. v. Andreas, 239 F. Supp. 962 (S.D.N.Y. 1965), it was held that where stock of an acquired company is not freely traded, the most trustworthy measure is the value of the stock received.

See also Stella v. Graham - Paige Motors Corp., 132 F. Supp. 100 (S.D.N.Y. 1955), remanded on other grounds, 232 F. 2d 299 (2nd Cir. 1956), cert. den. 352 U.S. 831 (1956), and Fistel v. Christman, 135 F. Supp. 830 (S.D.N.Y. 1955), where it was held in each case that, if the value of consideration given for stock is difficult to ascertain, the market price of the stock received for that consideration is some evidence of the value of the consideration.

The mean market value of Shattuck's stock on February 1, 1966, was \$8.75 per share (Pre-Trial Order, App. A106).

Newmark v. RKO General, Inc., supra, 305 F. Supp., at p. 313, makes it clear that in a situation of the kind at bar the consideration for the purchase is to be measured by the fair market value of the shares given up for the Shattuck shares on "the effective date of the merger." See, also, Blau v. Lamb, supra, 242 F. Supp., at p. 155, Park & Tilford, Inc. v. Schulte, supra, 160 F. 2d, at p. 988, and Blau v. Lamb, supra, 163 F. Supp., at p. 531.

Cases such as Champion Home Builders Co. v. Jeffress, 352 F. Supp. 1081 (E.D. Mich. 1973), which hold that the relevant date for valuation purposes is the date on which the parties became "irrevocably bound", are irrelevant in the situation at bar for three reasons:

1. There is no evidence on the record that the merger agreement (Ex. "A" to P ex. 13) became irrevocable prior to February 1, 1966.

2. In fact, the merger agreement contained various "out" clauses in Paragraphs "10", "13" and "14" specifying conditions for the final effectuation of the contemplated merger.

3. Even had the merger agreement become "irrevocable" in the sense that either Fireproof or Shattuck

could bring suit on it, LaMorte himself succeeded to no rights under the agreement until the effectiveness of the merger because it always could have been abandoned by mutual consent of Shattuck and Fireproof [Paragraph "14 (a)" of the merger agreement].

Plaintiff's expert, John G. Russell, with over twenty years of experience (App. 142), valued the Fireproof shares as of February 1, 1966, at \$100 each, which is the equivalent - taking the merger ratio of 13.21 into consideration - of \$7.57 per Shattuck share. He took both the average earnings for 1964 and 1965 and for the five years from 1961 through 1965, multiplied the results by a PE ratio of ten, considered the other relevant factors and arrived at his figure of \$7.57 (App. 156). He testified that no additional value should be given to the vacant land owned by Fireproof because the building then occupied by it was "very old" (App. 177 - 182). He further testified that his figure took into proper consideration the "control" factor (App. 182 - 192) and that a minority interest would be worth less on a per share basis (App. 186).

Defendant's expert, Hugh A. MacMullan, had less than half the experience of plaintiff's expert (App. 270). He made

his appraisal as of December 31, 1964 (App. 289) which, as shown above, is a completely irrelevant date. The Court (App. 293) stated that Mr. MacMullan's evaluation "will not be considered" if it is decided that the December 31, 1964, date is not the legally relevant date. Because February 1, 1966, was the relevant date, Mr. MacMullan's evaluation should not have been considered, just as his approach to a premium for control should not have been considered.

Mr. MacMullan further testified that he used a 10.8 PE ratio applied only to the year ending December 31, 1964, to reach his conclusion (App. 282). He testified on cross that the 1964 earnings used were \$184,000 (App. 299). He further testified he didn't believe it more reasonable to take an average over more than one earnings period (App. 303), but that if he had been making his appraisal as of the end of 1965 he would have used an average figure because otherwise the value of the company would have been abnormal (App. 304). His testimony was that Fireproof's earnings were in 1962, \$122,000; 1963, \$114,000; 1964, \$184,000; and in 1965, \$38,000 or \$39,000 (App. 304). The approach is patently partisan. 1964 was a most exceptional year on the high side and 1965 was exceptional on the low. Obviously, Mr. Russell's approach was sounder than that of applying a PE ratio solely

to the abnormally high year of 1964.

Mr. MacMullan partially corroborated Mr. Russell's statement that the existing office building of Fireproof was very old in that he did not examine the building, and agreed that "every building has a life" (App. 298).

We respectfully submit that the testimony of Mr. Russell was clear and convincing and should be accepted in lieu of the rather contradictory testimony of Mr. MacMullan, especially since Mr. MacMullan's testimony was based on an irrelevant date, December 31, 1964.

The complaint seeks damages based on the difference between \$56,566.36, based on a purchase price of \$8.75, and \$37,036.04, based on a purchase price of \$10.75 (compare P. ex. 11 with P. ex. 12). The pre-trial order, however, (Paragraph "vi", App. A109) provides for a motion to amend the complaint at the trial to conform to the evidence. Such a motion was made by Shattuck (App. 265 - 66). Plaintiff now seeks damages based on a purchase price of \$7.57, the value fixed by Mr. Russell.

If Shattuck's motion to amend is granted the ad damnum will be increased to \$31,053.20. That computation is based on the fact that the difference of \$2.00 is assumed

per share purchase price for Shattuck equals \$19,530.32. The additional difference in value per share between \$8.75 and \$7.57 is \$1.18, 59% of \$19,530.32, or \$11,522.88. Adding \$11,522.88 to \$19,530.30 gives a total of \$31,053.20. Mr. Russell testified that his value of \$7.57 took into consideration any factor of "control" (App. 182-192).

We concede that in certain situations a premium may be payable for control, Blau v. Lamb, 242 F. Supp. 151, 161 (S.D.N.Y. 1965), aff'd in part and rev'd in part, 363 F. 2d 507 (2d Cir. 1966), cert. denied, 385 U.S. 1002, Mueller v. Korholz, 449 F. 2d 82, 88 (7th Cir. 1971). However, these cases involved special circumstances in that in the Blau case there was a large up-trend in earnings due to a new management team, which might be expected to continue this growth pattern, and in the Mueller case in that there had been large offers for the stock which had been refused.

There are no such circumstances in the case at bar. The LaMorte interests (P ex. 13, p. 19), owned the controlling interest in Fireproof, as well as that of Shattuck and to conclude that a premium for control was being paid would be faintly absurd.

We respectfully submit, therefore, that the Court should grant judgment in the total amount of \$31,053.20 plus costs and interest, in favor of Shattuck.

## POINT II

### THE COURT BELOW ERRED IN NOT GRANTING PRE-JUDGMENT INTEREST ON THE AWARD TO SHATTUCK

The award of such interest is lodged in the discretion of the Court. In the case at bar LaMorte, by his actions in 1963 in repaying "short-swing" profits to Shattuck, showed a complete awareness of the nature and possible liability of his actions. When, in 1967, he was forced in the course of an investigation by the SEC into his activities in trading Shattuck's stock into disclosing his post 1963 short-swing profits he should not be considered to be an "innocent" by any means. The intention of Section 16(b) is to preclude inequitable profiting in the trading of the shares of an insider's company and, we respectfully submit, this should preclude the free use of the profits during the period prior to discovery. Pre-judgment interest should be rewarded.

## CONCLUSION

For all of the foregoing reasons the judgment below should be reversed and Shattuck awarded damages in the

amount of \$31,053.20, with pre-judgment interest and costs.

Respectfully submitted,

BURNS, VAN KIRK, GREENE & KAFER  
Attorneys for Plaintiff-  
Appellee-Appellant  
521 Fifth Avenue  
New York, N. Y. 10017  
972-0500

Alan Palwick  
Of Counsel

STATE OF NEW YORK )

: SS:

COUNTY OF RICHMOND )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 4 day of OCT. 1974 deponent served the within Brief upon Feldshuh + Frank

attorney(s) for Apple

in this action, at 144 East 44<sup>th</sup> St  
New York, NY 10017

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

  
ROBERT BAILEY

Sworn to before me, this

4 day of OCT. 1974

  
WILLIAM BAILEY

Notary Public, State of New York

No. 43-0132945

Qualified in Richmond County

Commission Expires March 30, 1976